IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EDUARDO PIMENTAL MELO,	§	
Petitioner,	§	
v.	§	CIVIL ACTION: H-04-3839
	§	
DOUGLAS DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Respondent has filed a motion for summary judgment (Dkt. 12) on petitioner's request for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 (Dkt. 1).[1] Petitioner Melo has filed a rebuttal (Dkt. 14). The court recommends that respondent's motion be granted and the petition be dismissed.

BACKGROUND

Melo was convicted of drug trafficking pursuant to his guilty plea in state court on October 18, 2002. He did not file an appeal. Melo's right to direct review of his conviction expired, and his conviction became final, on November 17, 2002. Melo alleges that he was housed at the Holiday Unit Transfer Facility from the time of his conviction until May 23, 2003, when he was transferred to the Jordan Unit in Pampa, Texas. Melo filed a writ petition in state court on December 31, 2003 alleging that his guilty plea was not voluntary and that

[1] The district court referred this matter to this court for report and recommendation (Dkt. 3).

he received ineffective assistance of counsel. On June 2, 2004, the Texas Court of Criminal Appeals denied without written order his application based on findings of fact and conclusions of law by the trial court. Melo filed his federal petition on September 27, 2004, again asserting the involuntariness of his guilty plea and ineffective assistance of counsel. The heart of Melo's claim is that the interpreter did not accurately translate what the court and counsel were saying and therefore he did not understand that he was entering a guilty plea.

ANALYSIS

Respondent makes three arguments for dismissal. First, respondent argues that the petition must be dismissed because it is a "mixed petition" that contains claims for which petitioner has not exhausted his state remedies.[2] Second, respondent argues the petition is barred by the statute of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Third, respondent argues on the merits that petitioner's allegations are conclusory and he has not met his burden to show that the state court's adjudication was contrary to or involved an unreasonable application of federal law or was based on an

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[2] This argument is based on page 6 of the form petition, which contains check marks by the grounds 20(d), that the conviction was obtained by the use of evidence from an unlawful arrest, and 20(e), that the conviction was obtained by a violation of the privilege against self-incrimination. As the instructions to question 20 make clear, it is not enough to simply check one of the listed grounds. A petitioner is required to state any supporting facts for any ground on which he relies. Melo does not state any facts either on his form petition or in his accompanying brief regarding grounds 20(d) and (e), and he expressly disclaims his intention to assert such grounds in his rebuttal. The court does not construe the petition as presenting such claims for review.

unreasonable determination of facts. The court concludes that petitioner's federal petition for writ of habeas corpus is barred by the AEDPA's one-year statute of limitations. Alternatively, the court concludes that the petition is without merit.

A. Statute of Limitations

The AEDPA provides as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Pursuant to § 2244(d)(1)(A), the deadline for Melo to file his federal habeas petition expired November 18, 2003, unless it was subject to equitable or statutory tolling. Melo argues that his limitations period was tolled from November 18, 2002 until May 23, 2003 because:

> [W]hile at the Holiday Unit petitioner made numerous attempts to receive assistance on his case, but such requests went unanswered. (He sent I-60's to counsel for offenders). The Holiday Unit[']s law library did not have books in Spanish, nor any inmates trained in law to help or willing to help Spanish speaking inmates.

Melo further contends that his limitations period should be tolled from December 31, 2003 until June 2, 2004, the period during which his state court writ application was pending. Only if both tolling arguments are accepted is Melo's petition timely.

The AEDPA's limitation period is not jurisdictional and is subject to equitable tolling in "rare and exceptional" circumstances. *Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). In the Fifth Circuit, the unavailability of adequate library resources is not a "rare and exceptional" circumstance warranting equitable tolling. *Id.* at 171-73; *Scott v. Johnson*, 227 F.3d 260, 263 n.3 (5th Cir. 2000). Melo's inability to communicate in English and the lack of a Spanish-speaking legal assistant are also circumstances shared by numerous prisoners, and are not rare and exceptional circumstances warranting equitable tolling. *See Martinez v. Kuhlmann*, No. 99 CIV 1094, 1999 WL 1565177, *5 (S.D.N.Y. Dec. 3, 1999) (gathering district court cases), *opinion adopted*, 2000 WL 622626 (S.D.N.Y. May 15, 2000); *see Turner v. Johnson*, 177

F.3d 390, 392 (5th Cir. 1999) (holding that unfamiliarity with the law due to illiteracy or any other reason does not merit equitable tolling).

Furthermore, equity will only help those who diligently pursue their rights. *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). Equity will not save petitioner in this case where seven months passed between his transfer to the Jordan Unit, at which point any impediment pertaining to the library at Holiday was removed, and the filing of his state court application. *See Scott* 227 F.3d at 263 (holding that petitioner did not diligently pursue relief where impediment was removed six months prior to expiration of limitations period). Having found no basis for equitable tolling, the court turns to Melo's statutory tolling argument.

The Fifth Circuit has recognized statutory tolling pursuant to § 2244(d)(1)(B) in a case where the petitioner affirmatively alleged that he had no knowledge of the one-year limitations period under the AEDPA and where the absence of that statute from the prison library actually prevented petitioner from filing a timely petition. *Egerton v. Cockrell*, 334 F.3d 433, 437-38 (5th Cir. 2003). This case is distinct from *Egerton*. *Egerton* recognizes statutory tolling only where petitioner had no knowledge of the AEDPA's statute of limitations ***and*** the library at the facility where he was incarcerated did not contain a copy of that statute. *Id.* (emphasis added). In this case, respondent has presented evidence that in fact the Holiday Unit did contain a copy of the AEDPA.[3]

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[3] Respondent's reply (Dkt. 18), Exhibit A.

Melo complains that the AEDPA was not made available to him in Spanish. The court has found no authority supporting the argument that the unavailability of a Spanish translation of the AEDPA is a state created impediment to filing of a petition for purposes of § 2244(d)(1)(B). Petitioner's inability to read and understand English and the unavailability of a Spanish speaking inmate willing to help petitioner are not state created conditions.[4] Respondent has presented evidence that it is TDCJ's policy to provide staff interpreters for offenders who cannot communicate in or understand English.[5] This policy is sufficient to meet the state's duty under *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Supreme Court's seminal case regarding prisoners' right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 356 (1996) (recognizing that a library alone may not be sufficient for non-English speaking inmates, but "leav[ing] it to prison officials to determine how best to ensure that inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. But it is that capability, rather than the capability of turning pages in a law library, that is the touchstone.").

In this case, there is no evidence that state-created conditions at the Holiday unit actually prevented Melo from filing his petition. While Melo alleges that he "sent I-60s to

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[4] In fact, Melo admits that there may well have been Spanish speaking inmates at Holiday who could have helped him, he simply did not know who they were. Petitioner's sur-reply, at 8.

[5] Respondent's reply, Exhibit A. Texas Offender Handbook (Dkt. 19), at 45.

counsel for offenders"[6] to request assistance with his case, he does not allege that he sought assistance from a staff interpreter at Holiday. Moreover, pursuant to the TDCJ Offender Handbook, which was available in Spanish, I-60 requests for assistance regarding access to the courts are to be sent to the specific unit's Access to Courts Supervisor, not state counsel for defenders.[7] The conclusory allegation that Melo sent an I-60 to state counsel for defenders does not support a finding that the state prevented Melo from filing a petition while he was housed at the Holiday unit.

The court concludes that petitioner is not entitled to statutory tolling of his statute of limitations for the period that he was incarcerated at the Holiday Unit. His petition is therefore time-barred under the AEDPA.

B. Merits of Involuntary Plea and Ineffective Assistance of Counsel Claims

Even if his petition were timely, Melo's claims are meritless. Because the Texas Court of Criminal Appeals has already denied those claims, Melo may not obtain federal relief unless he can show that the state court's decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). A

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6 Rebuttal, at 1. The evidence neither supports nor conclusively rebuts this allegation. The state maintains such records for only two years, therefore any I-60s filed while Melo was at the Holiday unit would have been destroyed by now. Respondent's Reply, Exhibit B.

7 TDCJ Offender Handbook (Dkt. 19), at 114.

decision is contrary to federal law "if the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court on a set of materially indistinguishable facts." *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Under an "unreasonable application" analysis, a writ may issue "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

The Texas Court of Criminal Appeals denied Melo's claims upon the findings of the trial court without a hearing. Such a denial constitutes an adjudication on the merits. *Hill*, 210 F.3d at 485. Thus, the ultimate determinations of whether a plea is voluntary or counsel is ineffective are subject to *de novo* review in this court; however the state court's findings of historical facts underlying such determinations are entitled to deference. *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983) (voluntariness of plea); *Boyle v. Johnson*, 93 F.3d 180, 187 (5th Cir. 1996) (ineffective assistance of counsel). Factual determinations by the state court are presumed to be correct, and must be rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Jackson v. Johnson*, 150 F.3d 520, 524 (5th Cir. 1998). This court will not conduct an evidentiary hearing unless Melo shows that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered, and that the facts are such that but for the constitutional error the

applicant would not have been found guilty. 28 U.S.C. § 2254(e)(2); *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2000).[8]

A plea is voluntary if the defendant understands the nature and substance of the charges against him, and does require that the defendant understand their technical legal effect. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

To establish ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner cannot establish such a claim if either requirement is not met. *See Lincecum v. Collins*, 958 F.2d 1271, 1278 (5th Cir.1992). The reviewing court must presume that petitioner's counsel rendered effective assistance. *See Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland*, 466 U.S. at 690). Where a voluntary guilty plea has been entered, all nonjurisdictional defects in the proceedings against the defendant are waived. *See United States v. Hoctel*, 154 F.3d 506, 507 (5th Cir. 1998). Therefore, review of a defendant's putative ineffective assistance of counsel claims are limited to those allegations that concern the voluntariness of the defendant's plea. *See Smith v. Estelle*, 711

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[8] Melo does not contend that he was denied a full and fair hearing in state court. *See Murphy*, 205 F.3d at 816 (holding that a full and fair hearing does not require live testimony, but can be based on a opportunity to present written papers).

F.2d 677, 682 (5th Cir. 1983). Melo's two claims essentially overlap, as they both depend on the allegation that the interpreter inaccurately translated the plea proceedings. *See Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), *superceded by statute on other grounds*, 28 U.S.C. § 2253(c). Thus, a finding that this plea was voluntary resolves both claims.

Under these legal standards, Melo is entitled to no relief. Because Melo did not appeal his conviction after entry of his guilty plea, the record does not include a transcript of the hearing at which the court accepted his plea. However, the record does contain Melo's signed guilty plea which states that he is satisfied with the attorney representing him and that he intends to enter a plea of guilty with no agreed recommendation as to his punishment. The guilty plea was approved by the presiding judge, who signature attests that he admonished the defendant of the consequences of his plea and ascertained that Melo entered the plea knowingly and voluntarily after discussion with his attorney.[9]

The state court engaged in additional fact-finding on the issue of the voluntariness of Melo's plea. Melo's counsel, Paul Mewis, was ordered to file an affidavit regarding the circumstances under which the plea was entered. Mewis swore in his affidavit that he informed Melo that he would have no right to appeal his conviction if he pled guilty. Mewis further swore that a competent interpreter was present during all communications between Mewis and Melo, and that the court provided a competent interpreter, Elizabeth Broyles, to

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[9] State Court Records (Dkt. 13), at 52.

explain all of the plea papers and to interpret during the actual plea proceeding. Mewis testified in his affidavit that he has no doubt that Melo's plea was made freely, knowingly and intelligently. Based on Mewis's affidavit, the state court found that Mewis advised Melo of the consequences of his plea, including that there would be no appeal, and that Mewis never promised the applicant that the guilty plea would be overturned on appeal. The court further found that a competent interpreter assisted Mewis in advising Melo regarding the plea papers and at the actual plea proceeding.

The facts of this case have much in common with *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994), on which Melo relies. In *Chacon*, the Ninth Circuit determined that an evidentiary hearing was required on the petitioner's claim that the court interpreter did not accurately translate what the court and his counsel were saying. This case is distinct from *Chacon* in three significant ways. First, *Chacon* was decided prior to enactment of the AEDPA and under a more lenient Ninth Circuit standard for granting an evidentiary hearing in a habeas case. Second, the state court here made a specific factual finding that "all of the foregoing [information about the consequences of the guilty plea] was explained to the applicant through the interpreter Elizabeth Broyles."[10] In contrast, the state court in *Chacon* made no finding on the petitioner's claim that what the interpreter told him was not what his counsel said. *Chacon*, 36 F.3d at 1465. Third, Chacon presented new allegations, not contested by the state, that following his proceedings in state court the interpreter was barred

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[10] *Id.* at 45-46.

from serving as an interpreter in court in the future for negligence and for coercing Spanish language clients into guilty pleas without informing them of the consequences or nature of the charges against them. *Id.* Here, there is no evidence beyond Melo's conclusory allegation, also made before the state court, that the court-provided interpreter misled Melo about the nature and consequences of his guilty plea.

Melo has not met his burden to show that the state court's decision on his habeas application was contrary to or involved an unreasonable application of federal law or an unreasonable determination of facts. Given the factual finding by the state court that a competent interpreter informed Melo of the nature and consequences of his plea and based on the entire record, the court concludes that Melo's guilty plea was voluntary under federal standards.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that respondent's motion for summary judgment be granted and the petition for writ of habeas corpus be dismissed as barred by the statute of limitations. The court further recommends that, even if timely, the petition be dismissed on its merits.

Signed at Houston, Texas on August 19, 2005.

Stephen Wm Smith
United States Magistrate Judge